UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOGISTICARE SOLUTIONS, INC.
a subsidiary of PROVIDENCE SERVICE CORPORATION

Respondent

and **Case No. 16-CA-134080**

KATHERINE A. LEE, an Individual

Charging Party

BRIEF OF RESPONDENT LOGISTICARE SOLUTIONS, INC. IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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ATTORNEYS FOR RESPONDENT LOGISTICARE SOLUTIONS, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

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RESPONDENT LOGISTICARE SOLUTIONS, INC.'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respondent LogistiCare Solutions, Inc.[1] ("Respondent" or "LogistiCare") hereby files its Brief in Support of its Exceptions to the Administrative Law Judge's Decision.

I. STATEMENT OF THE CASE

Counsel for the General Counsel ("General Counsel") alleged that Respondent's Jury and Class/Collective Action Waiver (the "Waiver") and Jury and Class Action policy in its Employee Handbook violate the National Labor Relations Act, 29 U.S.C. § 151, et seq. (the "NLRA" or "the Act") by interfering with Charging Party Katherine A. Lee's ("Charging Party") rights under Sections 7 and 8(a)(1) thereunder. Respondent denies that the Waiver and Employee Handbook policy violate the NLRA or in any way interfere with Charging Party's or any other employee's rights under the NLRA.

[1] As was noted below, Respondent is misidentified. LogistiCare Solutions, LLC is the proper identity of Respondent.

After the parties submitted their respective position statements as well as a Joint Motion and Stipulation of Facts, the Administrative Law Judge (the "ALJ") found that Respondent's Waiver and Employee Handbook policy constituted an unfair labor practice that violates Section 8(a)(1) of the NLRA. Respondent excepted to the ALJ's decision and now submits to the National Labor Relations Board (the "NLRB") its brief in support of its exceptions.

II.
STATEMENT OF FACTS

Respondent adopts and incorporates by reference the Joint Motion and Stipulation of Facts previously filed with the Board.

III.
RESPONDENT'S POSITION

Respondent's Waiver and the Employee Handbook policy do not violate the NLRA. Class and collective action waivers have repeatedly been upheld by the Supreme Court as well as numerous circuit and district courts. In addition to the Supreme Court, the ALJ and NLRB in this matter should follow the precedent set by the Fifth Circuit in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). As discussed by the Fifth Circuit in *D.R. Horton* and numerous other decisions cited herein, absent a contrary congressional command, neither the ALJ nor the NLRB has a legitimate basis upon which to invalidate the Waiver or Employee Handbook policy. As there is no language in the NLRA that provides a contrary congressional command, the ALJ erred when he found that the Waiver and Employee Handbook Policy violate Section 8(a)(1) of the NLRA.

Moreover, in actual practice the Waiver and Employee Handbook policy did not affect Charging Party's right to file a charge of discrimination, and the language in these

documents, which only addresses "lawsuits," cannot reasonably be construed to dissuade employees from filing charges with the NLRB alleging unfair labor practices. Indeed, Charging Party, despite executing the Waiver and acknowledging the Employee Handbook, filed a charge with the NLRB in this case. For the reasons discussed herein, Respondent requests that the Board reverse the ALJ's decision, hold that the Waiver and Employee Handbook policy do not violate the NLRA and dismiss Charging Party's charge.

IV.
ISSUES PRESENTED

1. Whether there is any Congressional command within the NLRA that provides employees with a substantive right to proceed on a class or collective basis. (Exception Nos. 3, 4, 6)

2. Whether the language within the Respondent's Waiver or Employee Handbook policy can be reasonably interpreted as precluding employees from filing an unfair labor practices charge with the NLRB. (Exception Nos. 1, 2, 5, 6)

V.
ARGUMENT

A. Class And Collective Action Waivers Are Valid and Enforceable As There Is No Congressional Command Under The NLRA That Creates A Substantive Right For Employees To Proceed Collectively.

Courts have repeatedly held that class and collective action waivers are valid and enforceable, whether as stand-alone agreements or as part of arbitration agreements. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1334-35 (11th Cir. 2014); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052-53 (8th Cir. 2013); *Raniere v. Citigroup, Inc.*, 533 Fed. App'x 11, 14 (2d Cir. 2013); *Mazurkiewicz v. Clayton Homes, Inc.*, 971 F.Supp.2d 682, 692 (S.D. Tex.

2013). In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Supreme Court expressly upheld a class action waiver in the arbitration context, finding that the Federal Arbitration Act prevailed over a California statute that prohibited class action waivers in arbitration proceedings. Not long thereafter, in *American Express Co. v. Italian Colors Restaurant,* 133 S. Ct. 2304, 2309 (2013), the Supreme Court held that class action waivers will be enforced absent a "contrary congressional command[.]" *See also, CompuCredit Corp. v. Greenwood,* 132 S. Ct. 665, 669 (2012). Here, there is no contrary congressional command that permitted the Administrative Law Judge ("ALJ") to invalidate Respondent's Waiver. Accordingly, the ALJ's decision should be reversed and the NLRB should hold that Respondent's Waiver and Employee Handbook policy are valid and enforceable.

The ALJ, relying upon Board decisions that have either been reversed or conflict with Supreme and Circuit Court of Appeals precedent, incorrectly found that Respondent's Waiver[2] violates the NLRA. In his analysis, the ALJ relies upon *D.R. Horton*, 357 NLRB No. 184 (2012), *Murphy Oil, USA, Inc.*, 361 NLRB No. 72 (2014) and *Lutheran-Heritage Village-Livonia*, 343 NLRB 646 (2004), to support his holding that employers cannot require employees to waive their "NLRA right" to pursue collective and class action employment law claims. However, as the Fifth Circuit expressly held in *D.R. Horton*, there is no substantive right for employees to pursue class and collective actions. *D.R. Horton,* 737 F.3d at 357. "The use of class action procedures, though, is not a substantive right." *Id*. Rather, the Fifth Circuit correctly characterized a class action as "`a procedural device'" that is "`not itself a remedy'" *Id*.

[2]As the language the General Counsel challenges in Respondent's Waiver and Employee Handbook policy is virtually identical, the arguments Respondent makes apply with equal vigor to the Employee Handbook policy, and thus they are referred to jointly herein as "the Waiver".

The Fifth Circuit in *D.R. Horton* went on to note that the Supreme Court has determined that employees do not have a substantive right to proceed in a collective/class capacity under the Age Discrimination in Employment Act ("ADEA"), despite the fact that the ADEA contains explicit provisions for class procedures. *Id.* (*citing Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991)).

Like the Fifth Circuit, virtually every court to consider the NLRB's decision in *D.R. Horton* has rejected it. *Fowler v. CarMax, Inc.*, 2013 WL 1208111, at *8 (Cal. Ct. App. Mar. 26, 2013); *Birdsong v. AT&T Corp.*, 2013 WL 1120783, at *6 n.4 (N.D. Cal. Mar. 18, 2013); *Ryan v. JPMorgan Chase & Co*., 2013 WL 646388 at *6 (S.D.N.Y. Feb. 21, 2013); *Noffsinger-Harrison v. LP Spring City, LLC*, 2013 WL 499210, at*6 (E.D. Tenn. Feb. 7, 2013) (stating that argument based on *D.R. Horton* "that the Norris-LaGuardia Act repeals the FAA if the statutes are in conflict . . . lacks merit"); *Miguel v. JPMorgan Chase Bank, N.A.*, 2013 WL 452418, at *9 (C.D. Cal. Feb. 5, 2013) ("[E]very district court in this circuit to consider [*D.R. Horton*] has declined to follow it."); and *Torres v. United Healthcare Servs., Inc*., 2013 WL 387922, at *9 (E.D.N.Y. Feb. 1, 2013); *Jasso v. Money Mart Express, et al.*, U.S. Dist. LEXIS 52538 at *26-27 (N.D. Cal. April 13, 2012) ("because Congress did not expressly provide that it was overriding the FAA, the court cannot read such a provision into the NLRA."); . *Morvant v. P.F. Chang's China Bistro*, 2012 U.S. Dist. LEXIS 63985, at *19 (E.D. Cal. 2012) (enforcing class action waiver and declining to follow *Horton*); *Palmer v. Convergys Corp.*, 2012 U.S. Dist. LEXIS 16200, 2012 WL 425256 (M.D. Ga. February 9, 2012) (same); *LaVoice v. UBS Fin. Servs, Inc.*, 2012 WL 124590 (S.D. N.Y. January 13, 2012) (same); *De Oliveira v. Citicorp N. Am., Inc.*, 2012 U.S. Dist. LEXIS 69573, *8 (M.D. Fla. May 18,

2012) (staying an FLSA collective action and directing the plaintiffs to individual arbitration). *Iskanian v. CLS Transportation*, 206 Cal. App. 4th 949, 962, 2012 Cal. App. LEXIS 650 at *21 (Cal. App. June 4, 2012) (declining to follow *Horton* because Section 7 does not contain the necessary "Congressional command"). Thus, controlling precedent as well as numerous other cases hold that class/collective action waivers are enforceable. *See e.g. Caley v. Gulfstream Aero. Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (enforcing arbitration agreement that contained class action waiver); *Zekri v. Macy's Retail Holdings, Inc.*, 2010 U.S. Dist. LEXIS 119453, *8 (N.D. Ga. 2010) (same).

In analyzing the ALJ's decision, it is important to note that the ALJ does not and cannot cite any specific language within the NLRA (or its legislative history) that provides employees with a substantive legal right to proceed on a class or collective basis. In *Murphy Oil, USA, Inc.*, 361 NLRB No. 72 (2014), this very point is made and discussed in detail in Members Miscimarra's and Johnson's dissenting opinions, in which they repeatedly emphasized that the NLRA contains no express class or collective action right in favor of employees, and that the majority simply overreaches to reach its holding. Respondent submits that the arguments raised in those dissenting opinions are correct and incorporates these arguments by reference herein.

As discussed above, courts, including the Supreme Court, have held that litigants do not have substantive rights to procedures to adjudicate their claims collectively, and such procedures may be waived. In the Rules Enabling Act ("REA"), Congress delegated authority to the Supreme Court to issue and implement the Federal Rules of Civil Procedure. 28 U.S.C. § 2072(b). The REA states that the Federal Rules "shall not

abridge, enlarge or modify any substantive right." *Id.* Rules 20 and 23 are permissible under the REA because they regulate procedures and do not impact substantive rights. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431, 1443 (2010) (plurality). The NLRA does not create class procedures. Therefore, employees do not have any right *under the NLRA* to bring class or collective actions in federal court. The Board in *D.R. Horton, Murphy Oil* and elsewhere attempts to treat both the NLRA and Rule 23 as expanding employees' rights under Section 7 to engage in protected concerted activity. The Board's position in this regard directly conflicts with the REA (and existing precedent) by attempting to conjure additional employee substantive rights, apparently out of the penumbra of both Section 7 and Rule 23. The Board's decision in *D.R. Horton* also conflicts with the FLSA's collective action procedures. These procedures, like Rule 23's class action procedures, do not provide substantive rights and may be waived. *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004).

Put simply, the NLRA does not provide employees with a substantive legal right to proceed on a class or collective basis. Accordingly, there is no contrary congressional command that permits the Board to invalidate the class and collective action waivers that Respondent and its employees freely entered into at the outset of their employment relationship. Indeed, the NLRA, unlike other statutes, does not even contain provisions for class procedures, let alone attempt to create a substantive right for employees to proceed collectively. Moreover, neither the ALJ nor the Board, an agency, has the authority, inherent or otherwise, to create substantive employee rights. The creation of such rights lies exclusively within the purview of Congress.

Although the ALJ asserts in his decision that he is not bound by the Fifth Circuit's decision in *D.R. Horton*, the ALJ wholly failed to explain how his holding could co-exist with the Supreme Court precedent cited herein. Rather than conform to the Supreme Court precedent discussed herein, the ALJ's holding in this matter conflicts with such precedent, instead dutifully following, as he was bound to do, the erroneous Board precedent of *D.R. Horton* and its progeny. In the *D.R. Horton* case, the Board, did not file a petition for *certiorari* with the Supreme Court. Instead, after the Board strategically decided not to appeal the Fifth Circuit's ruling in *D.R. Horton*, it erroneously reaffirmed its contrary path in *Murphy Oil*, *supra.*, However, the Board cannot simply continue to ignore the decisions of the circuit court of appeals covering the state where the charge was filed, or the other courts to whom its decisions are appealed. *See Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980) ("However, the Board cannot, as it did here, choose to ignore the decision as if it had no force and effect. Absent reversal, that decision is the law which the Board must follow."). For all of these reasons, the ALJ's decision is erroneous and Respondent requests that the Board reverse the ALJ's decision, and dismiss the Charging Party's charge.

B. The Waiver Cannot Reasonably be Interpreted as Preventing Employees from Filing Charges with the NLRB.

In his decision, the ALJ found that Respondent's Waiver (as well as its Employee Handbook policy) would lead the average layperson to believe that he or she cannot file a charge with the NLRB. Based upon that finding, the ALJ concluded that Respondent violated Section 8(a)(1) of the Act. An analysis of the language used in the Waiver demonstrates that it cannot reasonably be interpreted to prohibit employees from filing a

charge with the NLRB. Indeed, the Charging Party in this very case filed a charge with the NLRB even though she had executed the Waiver.

It is clear from the language of the Waiver that it does not pertain to NLRB charges. The Waiver, which is essentially two relatively short paragraphs, speaks exclusively in terms of "*lawsuits*." There is no mention of a waiver relating to anything other than filing a *lawsuit*. Indeed, the Waiver does not mention the words "agency," "charge," "proceedings," "legal proceedings," "civil proceedings," or any other general terms that the ALJ or Board could reasonably construe to include filing a charge with the NLRB. No reasonable lay person could conclude from the Waiver's language that it prohibits him or her from filing a charge with the NLRB. Further, the language in the Waiver does not suffer from any of the infirmities about which the Board expressed concern in previous cases. Further, nothing in the Waiver precludes a union from filing a charge on behalf of its members or unit collectively, nor does it preclude the General Counsel from issuing a complaint upon the collective claims of different employees, which are the normal processes by which the Board and General Counsel operate.

During the proceedings before the ALJ, the General Counsel relied upon *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), and *U-Haul Company*, 347 NLRB 375, 377 (2006), to support the contention that Respondent's Waiver should be construed "as prohibiting Section 7 collective activity and prohibiting recourse to Board procedures because the rules did not explicitly allow claims under the NLRA."[3] The facts in *Lutheran Heritage* and *U-Haul* are inapposite to the current case and, if anything, demonstrate that Respondent's Waiver does not violate the NLRA. As such, neither case lends support to the ALJ's conclusions.

[3] Counsel for the General Counsel's Position Statement, at 2.

In *Lutheran Heritage*, the Board analyzed whether certain work rules could "reasonably construed by employees as prohibiting lawful concerted activity." None of the work rules, however, pertained in any way to a class or collective action waiver. The rules at issue pertained to actions such as loitering and unlawful strikes, not class and collective action waivers. Further, as discussed below, nothing in the Waiver can be construed as prohibiting concerted activity. As such, *Lutheran Heritage* provides no precedential value whatsoever to the case at bar.

The *U-Haul* case is likewise distinguishable and, when analyzed, further underscores why the Respondent's Waiver does not offend the NLRA. In *U-Haul,* the employer required its employees to comply with a mandatory arbitration policy. The arbitration policy, however, applied to all "federal law or regulations." Based upon the policy's broad language, the Board concluded that "employees would reasonably construe such broad language to prohibit the filing of unfair labor practice charges with the Board." *U-Haul*, 347 NLRB at 378. Thus, the Board found that the policy violated Section 8(a)(1). *Id.*

By contrast, Respondent's Waiver is extremely narrow and contains no catch-all language, such as the policy in *U-Haul*. Respondent's Waiver, again unlike the policy at issue in *U-Haul*, explicitly and repeatedly states that it applies only to *lawsuits*. There is no language in Respondent's Waiver that can be reasonably argued to apply to anything other than *lawsuits*. Nothing in Respondent's Waiver expressly or implicitly precludes employees or a union from collectively filing an unfair labor practices charge with the NLRB, nor does it in any manner impinge on the discretion of the General Counsel.

Here again, the Fifth Circuit's decision in *D.R. Horton* is instructive. In *D.R. Horton*, the Fifth Circuit upheld that portion of the Board's decision that found D.R. Horton's waiver overbroad. *D.R. Horton*, 737 F. 3d at 363. Importantly, the Fifth Circuit noted that D.R. Horton's arbitration agreement required employees to waive the "right to file a lawsuit *or other civil proceeding* relating to Employee's employment …." *Id.* (emphasis in original). Based upon the "or other civil proceeding" catch-all language and noting similar catch-all language in the *U-Haul* case, the Fifth Circuit found that "a reasonable impression could be created that an employee is waiving not just his trial rights, but his administrative rights as well." *Id.* at 363.[4] The Fifth Circuit did not, however, find any violation in the employer's requirement of a class/collective action waiver. It is clear from the Fifth Circuit's opinion that the catch-all language in the arbitration agreement was the catalyst for the Fifth Circuit to find that the agreement's language offended the NLRA. Again, Respondent's Waiver is far more narrowly written, does not contain catch-all or other sweeping language, and is consistent with the NLRA in preserving the employee's right to file a charge for unfair labor practices.

It should also be noted that employees have a fundamental right under Section 7 to choose to refrain from concerted activity. Consistent with Section 7, Respondent's Waiver is voluntary in nature and is provided to employees at the outset of employment. Applicants may choose to work elsewhere if they are uncomfortable with Respondent's Waiver. Indeed, as the Board is well knows, employees may choose to refrain from the exercise of their Section 7 rights. Thus, even if a class/collective action lawsuit waiver

[4]The Fifth Circuit in *D.R. Horton* also analyzed another Board decision, case, *Bill's Electric,* 350 NLRB 292 (2007), which likewise found an NLRA violation where the policy broadly applied to "any legal claims in connection with …rights under Federal or State Law." Clearly, the language in the policy at issue in *Bill's Electric* is far broader than Respondent's Waiver.

somehow invokes Section 7 rights, an employee's voluntary decision to refrain from concerted activity is likewise entitled to protection by the Board.

Finally, Charging Party's own conduct undercuts the ALJ's decision. The ALJ found that the Waiver violates the NLRA because employees will assume it bars them from filing charges with the NLRB. However, this finding is flawed given that Charging Party in this very action filed an unfair labor practice charge. Thus, Charging Party's own course of action undermines the ALJ's finding and the argument that the Waiver dissuades employees from filing charges. Given that the Respondent's Waiver does not violate the NLRA, the Board should reverse the ALJ's decision and dismiss the charge.

VI.
CONCLUSION

For the reasons stated above, Respondent requests that the Board reverse the ALJ's decision, uphold Respondent's Waiver (and Employee Handbook policy) as not violative of the Act, and dismiss the Complaint in its entirety.

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he filed the foregoing **BRIEF OF RESPONDENT LOGISTICARE SOLUTIONS, INC.** via the NLRB E-Filing System and served copies on the following via e-mail on May 13, 2015:

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